Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	Phase II
Telecommunications Act of 1996	)	

REPLY COMMENTS

BELLSOUTH CORPORATION
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SUMMARY

The Commission need not promulgate any additional rules to implement those sections of the Telecommunications Act of 1996 that are the subject of this Phase II rulemaking. Section 251(c)(5) is essentially identical to the Commission's long-standing "all carrier rule." All the Commission need do is permit the offering of a new network interface immediately upon disclosure of the requisite information in order to facilitate rapid development of opportunities for interconnection. The requirements of Section 251 (d)(1) with respect to number administration and number portability have effectively been fulfilled in separate Commission proceedings commenced well in advance of the 1996 Act. All the Commission need do is to appoint, as quickly as possible, the constituent members of the North American Numbering Council and conclude its rulemaking in CC Docket No. 95-116.

The Commission should defer to the state's in the implementation of the Act's dialing parity requirements. The Commission should reject the efforts of new entrants to bootstrap rights of mandatory customer premises access on to the explicit provisions of the Pole Attachments Act. The commission should allow the terms and conditions of pole attachments to be negotiated between carriers and service providers, allow any disputes that may arise to be resolved through existing complaint procedures, and address any regulatory oversight issues in its separate Section 224 rulemaking.

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BellSouth Corporation, BellSouth Enterprises, Inc. and BellSouth Telecommunications, Inc. (collectively "BellSouth") hereby submit their Reply Comments in the above referenced proceeding.[1]

INTRODUCTION

The Federal Communications Commission ("Commission" or "FCC") should reject the efforts of several parties to stray from the plain language of Section 251 of the Telecommunications Act of 1996.[2] The Commission should refuse to pile on a number of extra-statutory obligations on local exchange carriers ("LECs"), particularly incumbents, as advocated by these commenters. As it reviews the comments in this proceeding, the Commission should constantly refer to the plain language of the statute.[3] Each provision

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[1] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking (rel. Apr. 19, 1996) ("Notice").

[2] Pub. L. No. 104-104. 110 Stat. 56 (1996) (the "1996 Act), sec. 101, § 251(b). All citations to the 1996 Act are consistent with the Notice and reference the Section numbers as they will be codified under Title 47 of the United States Code.

[3] Notice ¶ 2.

of Section 251 that is the subject of Phase II notice and comment is simple and straightforward, and none requires additional federal rules to be promulgated in this interconnection proceeding.

With regard to public notice of technical changes required by Section 251(c)(5), BellSouth has already demonstrated that this provision is essentially self-effectuating as it is substantially identical to the Commission's long-standing "all carrier rule."[4] In the case of number portability and number administration, the requirements of Section 251(d)(1) have effectively been met by Commission action in separate proceedings.[5] Dialing parity, as required under Section 251(b)(3) is being achieved through state-mandated intraLATA presubscription requirements imposed in the context of local competition dockets throughout the country.[6] The access to rights-of-way requirement of Section 251(b)(4) expressly refers to Section 224 of the Communications Act, under which the Commission has a long established regulatory oversight role, an administrative complaint procedure, and for which the Commission intends to initiate a new rulemaking proceeding this month.[7]

Nevertheless, commenters advocate immediate and direct federal intervention in local matters in a way that Congress never intended, and that, in any event, is not

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[4] BellSouth Comments at 1-6 (May 20, 1996).

[5] Id. at 6-8; 12 at n.25

[6] Id. at 8-13.

[7] Id. at 13-14; FCC Releases Most Recent Telecom Act Implementation Schedule, News Release 63709 (May 22, 1996), 5/20/96 Revised Draft Implementation Schedule at item 34. Addressing the substantive Section 224 issues in this Section 251 Phase II proceeding not only diverts the Commission from promulgating its Phase I rules, but controverts the reasonable notice provisions of the Administrative Procedure Act.

necessary given the record in this proceeding. The comments show that states are effectively meeting Congress's simple and straightforward definition of dialing parity, and providing for cost recovery, in ways that are completely consistent with the 1996 Act. Nevertheless, some commenters insist on federal intervention in the form of uniform, national rules that could have the effect of reversing the progress made to date. Commenters uniformly support the Commission's analysis of its jurisdiction over the North American Numbering Plan, and the continued vitality of its analysis in the Ameritech Order;[8] nevertheless some commenters want the Commission to limit states abilities' to respond to area code relief efforts in ways inconsistent with Ameritech. Finally, some interexchange carriers and competitive access providers attempt in their comments to game the plain language of § 251(b)(4) to obtain a federally mandated right of access to private property, including customer premises and inside wire, by asserting a piggyback privilege on any tangible LEC (and electric utility) presence of any kind, anywhere. In these reply comments, BellSouth will focus discussion in the areas of dialing parity, number administration and pole attachments back to the plain language of Section 251 and demonstrate that all attempts to create a complex regulatory web in which to entangle LECs have no support in the statute.

[8] See In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois, Declaratory Ruling and Order, 10 FCC Rcd 4596 (rel. Jan. 23, 1995) ¶ 5 ("Ameritech").

I. DIALING PARITY - STATES SHOULD BE ALLOWED PRIMARY OVERSIGHT IN IMPLEMENTING THE 1996 ACT'S DIALING PARITY PROVISIONS

As the comments by various state commissions and LECs make clear, dialing parity is being achieved through intraLATA presubscription in a variety of ways.[9] Those states and LECs that have implemented dual PIC methodologies should not be required to undo the work that has been accomplished, especially since these methodologies are completely consistent with the 1996 Act. Furthermore, states have provided for cost recovery mechanisms, and there is no record evidence that any of these methods are in conflict with the 1996 Act.[10] From a jurisdictional standpoint, nothing could be more properly within the state's purview than intrastate, intraLATA toll presubscription and local dialing parity issues.

There is nearly uniform consensus that, with respect to presubscription, balloting should not be required.[11] In a competitive market place, each carrier should have the burden of marketing to end user customers, and the experience of several states with this approach is instructive.[12] The Commission should reject ACSI's recommendation to create a federal task force to determine wording on billing inserts.[13] Federal micromanagement of the details such as wording on marketing materials is completely antithetical to the expedient local implementation of dialing parity.

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[9] Penn. Pub. U. Comm. Comments at 2-3.

[10] La. Pub. Ser. Comm. Comments at 6-7.

[11] Ohio Consumer's Council Comments at 3-4.

[12] Cal. Pub. U. Comm. Comments at 4-5.

[13] See ACSI Comments at 10.

Finally, there is no reason to treat non-Bell operating company("BOC") LECs any different than BOCs with respect to an implementation schedule. The Commission should reject MCI's suggestion that "LECs generally should be required to provide intraLATA presubscription within 6 months of the date of the order in this docket. . ."[14] Unless a state commission should mandate an earlier implementation schedule, it would be consistent with Congressional intent to require a non-BOC LEC to provide intraLATA toll dialing parity coincident with that LEC's provision of interLATA services, and in any event, no later than February 8, 1999.

II. NUMBER ADMINISTRATION

A. OVERLAYS ARE APPROPRIATE RESPONSES TO AREA CODE EXHAUST

Although the Commission's activities in the North American Numbering Plan ("NANP") docket clearly satisfy § 251's requirements, the Commission asked for, and received, comment on its interpretation of its Ameritech Order,[15] and, specifically, its conclusion that it should continue to delegate responsibility for implementing new area codes to the states.[16] What has emerged is a debate on the appropriateness of overlays, with CMRS providers demanding that the FCC mandate that overlays are never permissible,[17] with interexchange carriers asserting that overlays are only permissible with

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[14] MCI Comments at 7

[15] Notice ¶¶ 254 - 258

[16] Id.

[17] See, e.g., Teleport Comments at 9-11.

strict, uniform, federal strings attached,[18] and with others advocating that the method and use of overlays is properly left to the states.[19]

Neither Section 251 nor the Commission's order in Ameritech prohibit overlays, which are an industry approved method for NPA relief. The Commission should reject suggestions that overlays can never be used. Those that advocate strict federal conditions on overlays at least acknowledge that overlays can be an appropriate method of NPA relief, provided that they do not violate Ameritech's neutrality principles. Nevertheless, conditioning overlays on a specific set of federal rules is contrary to the Commission's correct conclusion that such considerations be left to the states in light of local conditions.[20] The Commission should affirm that overlays can be an appropriate method for area code relief and reject any efforts to link overlays with number portability. These are separate issues that have separate implementation schedules driven by different forces. Neither should the Commission require in all cases that all remaining NXXs in the original area code be given, in an overlay situation, to any particular class of telecommunications carriers as suggested by MCI.[21] Central office code assignment and area code relief efforts are governed by industry approved guidelines. These guidelines were developed through a consensus process involving all segments of the telecommunications industry, including interexchange carriers, competitive access providers and alternative LECs. Industry fora are in the best position to determine how such guidelines should be changed,

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[18] MCI Comments at 9-11.

[19] BellSouth Comments at 20.

[20] Notice ¶¶ 254-258.

[21] MCI Comments at 13.

if at all, in the context of implementing an overlay, and state commissions, as the local regulating authority, are in the best position to oversee their implementation.

B. THE COMMISSION'S NANP ORDER SATISFIES SECTION 251 OF THE 1996 ACT; HOWEVER THE COMMISSION SHOULD IMMEDIATELY APPOINT MEMBERS TO THE NORTH AMERICAN NUMBERING COUNCIL.

BellSouth and others have commented that the Commission's NANP Order creating the North American Numbering Council ("NANC") fulfills the Congressional mandate in Section 251(e)(1) to requiring the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[22] BellSouth disagrees with those commenters who argue that Section 251(e)(1) remains unsatisfied until the Commission actually appoints members to the NANC.[23] As a practical matter, however, BellCore and the incumbent LECs who must continue to administer the NANP will continue to be the target of unwarranted and unjustified criticism for as long as the delay in appointment of members to the NANC continues. Accordingly, BellSouth once again urges the Commission to take immediate action with respect to appointing members to the NANC.

Finally, BellSouth takes strong exception to MCI's procedurally inappropriate suggestion that Industry Numbering Council ("INC") activities be transferred to the NANC.[24] Such a suggestion should have been made in the context of comments filed in

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[22] BellSouth Comments at 12, n. 25, 19-20; MCI Comments at 9; U.S. West Comments at 2-3; NYNEX Comments at 17; USTA Comments at 14-15.

[23] BellSouth Comments at 19-20.

[24] MCI Comments at ll. n.15.

response to the Commission's Notice of Inquiry or Notice of Proposed Rulemaking in Docket 92-237, and, at the very least, in a petition for reconsideration of the NANP Order. It is both out of place and out of time in this proceeding. In any event, it is beyond the scope of the Docket 92-237; the purpose of the NANC is to assist the Commission in resolving numbering issues, make recommendations to the Commission, and assist in the oversight of NANP administration. Although transferring number administration responsibilities to the INC was under consideration in 92-237, removing the INC's separate activities and transferring them to the NANC was never an issue.

III. ACCESS TO RIGHTS-OF-WAY

A. NOTHING IN SECTION 251(b)(4) GRANTS MANDATORY ACCESS TO PRIVATE PROPERTY OVER THE OBJECTION OF THE PROPERTY OWNER

A number of commenters seek to expand the definitions of "poles," "ducts," "conduits," and "rights-of-way," as those terms are used in the Communications Act Amendments of 1978,[25] the Communications Amendments Act of 1982 ("Pole Attachment Act"),[26] the Cable Communications Policy Act of 1984,[27] and the Telecommunications Act of 1996,[28] to require local exchange carriers ("LECs") to guarantee their competitors' customer premises access. Nothing in the plain language of the 1996 Act, the 1934 Act, as amended from time to time, or the legislative history

[25] Pub. L. No. 95-234, § 6, 92 Stat. 33, 36 (1978).

[26] Pub. L. No. 97-259, § 106, 96 Stat. 1091 (1982).

[27] Pub. L. No. 98-549, § 4, 98 Stat. 2779, 2801, 2802 (1984).

[28] Pub. L. No. 104-104, § 224, 101 Stat. 56 (1996).

supports the mandatory LEC conveyance of interests in real property involving private parties outside the Commission's jurisdiction.

Poles are telephone poles or power company poles, ducts are ducts, conduit is conduit and rights-of-way are the public rights of way historically granted by local franchising authorities to the utilities covered by Section 224 of the Communication Act, not private easements, servitudes or licenses. These terms have precise meanings in the law, and more importantly, in decades of telecommunications, power generation, and cable television custom and practice. Thus the Commission should not, as AT&T suggest, "define 'poles, ducts, conduits, and rights-of-way' broadly to *include all pathways used to place facilities*".[29] This expansive definition is unsupported in the text of the 1996 Act, the 1934 Act, the 1978 Amendments, the 1984 Act or any of the relevant legislative history, or any of the case law.

AT&T reads § 251(b)(4), § 251(c)(6) and § 251(c)(3) "together" to reach the conclusion that "[s]ection 251(b)(4) governs *access to any part of the incumbent LEC's property not governed by the collocation and unbundling sections*.[30] Sections 251(b) and 251(c) cannot be read together because Section 251(b)(4), which is the subject of this

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[29] AT&T Comments at 14 (emphasis added). MCI adds to Congress's finite list of utility-owned facilities for carrying wirelines, ". . .it is essential that the Commission require all LECs to provide any requesting telecommunications carrier equal and nondiscriminatory access to any pole, *pole* attachment, duct, conduit, *entrance facilities, equipment room, remote terminal, cable vault, telephone closet, right of way, or any other pathway that they own or control* . . ." MCI Comments at 23. Winstar Communications, Inc., attempts to bootstrap access to roofs and to riser conduit to a LEC's obligations under Section 224. Winstar Comments at 3-6. See also Citizen's Utilities Company Comments at 2,4; MFS Comments at 9; ACSI Comments at 7; and GST Telecom Comments at 1.

[30] AT&T Comments at 15 (emphasis added).

Phase II proceeding, will apply to LECs, including new entrants such as AT&T and other competitive LECs ("CLECs"), whereas Section 251(c) obligations are the subject of the Commission's Phase I proceeding and only applies to incumbent LECs. These are very different and significant classes of telecommunications carriers.

The Commission should bear in mind the express language of § 251(b)(4), which applies to LEC and CLEC alike:

> *Access to rights-of-way.-- The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224.*

If Congress had truly meant § 251(b)(4) to govern access to any part of the incumbent LEC's property not governed by the collocation and unbundling sections, it would have said so. Instead, in § 251(b)(4) Congress expressly intended the access obligation to attach to all LECs, expressly used the specific terms "poles," "ducts," "conduits," and "rights-of-way" and specifically referred to Section 224 of the 1934 Act, where those terms mean what they say and nothing more.

Nowhere in the Act does Congress authorize the Commission to engage in the regulatory taking of private property, as suggested by AT&T when it requests that the Commission should clarify that the term "right-of-way":

> encompasses not only easements across land, but also entrance facilities, telephone closets or equipment rooms (e.g., within commercial buildings or multi-unit dwellings): cable vaults, controlled environment vaults, manholes, or any other remote terminal (to the extent those are not located in central offices or other LEC structures covered by the collocation regulations under Section 251(c)(6)); risers; and any other pathway *(or appurtenance thereto)* owned or controlled by a LEC.[31]

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[31] Id. Generally, BellSouth neither owns or controls pathways located on, in or over private, non-BellSouth property that are not poles or conduit systems. BellSouth does not own the vast majority of poles in its region. Building owners own or control the

If federal lawmakers had intended for the term right-of-way to mean "easements across land" as well as any spot, place, area, or location occupied by any LEC facility, they would have expressly provided for such a meaning in the 1996 Act. Elsewhere in the Communications Act, Congress specifically provides that any franchise granted to a cable system operator "shall be construed to authorize the construction of a cable system over *public rights-of-way*, and *through easements, which are within the area to be served by the cable system and which have been dedicated for compatible uses.*[32] Congress could have so provided in Section 251(b)(4), but chose not to.

It is significant that no cable television operator filing comments in this proceeding has requested such a broad definition of poles, ducts, conduits and rights-of-way.[33] In addition to the pole attachment rights granted to cable operators by Congress since 1978, the franchised cable industry has repeatedly sought to obtain judicial rulings that the express "easement" language contained in § 621(a)(2) of the 1984 Act confers a mandatory right of access to private property over the objection of the owner. Federal courts have uniformly rejected expansive interpretations of § 621:

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pathways and spaces inside buildings, including entrance facilities, which are generally not sized for other providers and do not lend themselves to changeouts the way that poles and conduits do.

[32] 47 U.S.C. § 621(a)(2).

[33] Indeed, Joint Commenters characterize the essentially public, not private nature, of the facilities enumerated in Section 224: "[p]*oles* represent social resources established as a public trust. . ." Joint Comments at 7 (emphasis added). AT&T, MCI and others would have the Commission convert private property such as "telephone closets . . .within mutil-unit dwellings. . .and any other pathway. . ." into "social resources." infra n.24 and accompanying text. Even Section 224, as amended, with its incredible asymmetrical burdens on incumbent LECs, is not that socialistic from an economic, political or regulatory standpoint.

> The most expansive construction of [47 U.S.C.] Section 541(a)(2) sought by the cable industry involves claims that a formal easement need not even exist for access to be granted. *It is argued that the mere presence of utility lines, exterior and interior to building structures, is sufficient to "create" an easement that can be "piggybacked" by a cable franchisee.* All courts to date have rejected such a statutory construction, finding it contrary to the plain language of the statute and to Congressional intent.[34]

Yet this right to piggyback to, in and through private property premises is precisely what CLECs argue that Section 224 provides, even though it does not include "easements," a legal interest, in its limited catalog of utility structures that must be made available.

Congress has, in the Communications Act, distinguished the legal category "easements" from the legal category "rights-of-way."[35] A majority of federal courts have now ruled that Section 621(a)(2) of the Communications Act, with its "easements. . . dedicated to compatible uses" language, does not grant access to private easements, as opposed to easements relinquished by property owners for utility use in general.[36] It is inconceivable that the requirements of Section 224 of the same Act, which Section does not include the legal category "easement," could attach to private easements, as AT&T and others argue.

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[34] Deborah C. Costlow, Access-to-Premises Litigation Under Federal, State and Local Law, PLI Cable Television Law 1995 (Jan. 15, 1995) 1111, 1114, ("Costlow") citing Century Southwest Cable Television v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994)("[t]he property owner cannot be assumed to have consented to the extension of Century's wires from the utility trenches to the individual units or to the placing of amplifiers or connection boxes on its property"); Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd., 678 F.Supp. 871 (N.D. Ga. 1986)(mere presence of utility lines would not serve to create easement where property owner had not in fact granted one; access not authorized simply because utility could exercise right of eminent domain to obtain an easement, but had not done so); UACC-Midwest, Inc. v. Occidental Development Ltd., No 1-90-CV-383 (W.D. Mich. May 22, 1990, preliminary injunction ruling and March 29, 1991 final decision).

[35] 47 U.S.C. § 621(a)(2).

[36] Costlow, p. 1117.

To accept the CLEC's expansive reading of the Act would be to extend the Commission's jurisdiction to persons and parties over whom it has no statutory authority,[37] and to compel illegal acts. It would require a LEC or an investor owned electric utility, for example, to grant a property right it may not have. BellSouth, for instance, has negotiated for rights of use over real property with certain railroad companies. These rights, which are extremely limited, were secured after vigorous, arms length negotiation for substantial consideration. They are granted by companies which, by the express terms of the Communications Act, are not subject to the Commission's jurisdiction. These rights of use do not allow for apportionment, or subsequent grants by BellSouth to third parties. This right to use may not involve structures such as poles, ducts or conduits, and it is not a public right of way, but rather a private easement. Application of Section 224 to these property interests would operate as an unconstitutional taking of private property without just compensation from the perspective of both BellSouth and the railroad/landowner.[38]

Of course, if BellSouth has erected telephone poles, or installed telephone conduit or ducts, on railroad property subject to a right of use agreement, BellSouth would have an obligation under the 1996 Act to make any excess capacity on or within these structures available to cable television operators and telecommunications carriers on a

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[37] See 47 U.S.C. § 152(a), providing that the provisions of the Communications Act apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the Untied States in such communication or such transmission of energy by radio, and to the licensing and regulation of all radio stations; with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service.

[38] See Duquesne Light Company ("DLC") comments at 13-14.

non-discriminatory basis, *subject to the attachee's obtaining permission from the railroad to invade, or trespass, on railroad property.*[39] Similarly, to the extent BellSouth has been granted a public right-of-way over railroad property for the purpose of providing telecommunications service, the same conditional obligation would attach. Any other interpretation of Section 251(b)(4) as it relates to a LECs obligations under Section 224, especially one that grants third parties rights of mandatory access to private property over the objection of the non-utility property owner, would exceed the statutory authority granted the Commission[40] by Congress and, indeed, would be constitutionally infirm.[41]

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[39] As BellSouth explained in its comments, this new statutory obligation, as a practical matter, does not change BellSouth's long-standing practice of allowing access to communications providers to its excess pole and conduit capacity on a first-come, first served basis.

[40] In the legislative history to the 1978 Amendments, the Congressional Committee on Commerce, Science and Transportation reported that, with respect to the new Pole Attachments Act:

> . . .any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Pub. L. No. 95-234, § 6, 92 Stat. 124 (1978).

[41] Loretto v. Tele-prompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that "a permanent physical occupation authorized by a government is a taking without regard to the public interest it may serve"). As DLC notes, a rule requiring absolute access would mean that the FCC would be authorizing telecommunications carriers permanently to occupy a land owner's property by making an attachment beyond the scope of an existing easement. DLC Comments at 13 n.24.

B. THE COMMISSION SHOULD NOT PROMULGATE RULES IMPLEMENTING SECTION 224 IN THIS PROCEEDING, BUT SHOULD CLARIFY WHAT CONSTITUTES NON-DISCRIMINATORY ACCESS TO POLE ATTACHMENTS IN GENERAL

Most of the issues raised by the Commission's notice, particularly those relating to the terms and conditions of pole attachments, including rental rates, are, for reasons of economic and administrative efficiency, best left to existing administrative complaint procedures, negotiation between parties and this month's scheduled Section 224 NPRM. In the meantime, the Commission's pole attachment complaint procedure serves as an adequate safeguard to resolve any irreconcilable controversies which may arise between now and when the Section 224 rulemaking is completed.[42]

Nevertheless, BellSouth agrees with many commenters who suggest that the Commission should clarify what is meant by non-discriminatory access, and the general conditions as to how access may be denied. BellSouth agrees with Time Warner Communications Holdings, Inc., that:

> [T]he term "nondiscriminatory access" as used in Section 224(f)(1) must be interpreted to require a utility to afford access to its facilities to any and all cable systems and telecommunications carriers on a first come, first-served bases so long as the entity seeking access agrees to comply with the utility's reasonable terms and conditions imposed pursuant to Section 224 and so long as the utility has the requisite space on its facility.[43]

As to "requisite space" BellSouth agrees with Ameritech that:

> [A] LEC should be required to make available only that space which it does not reasonably require to provide its existing and planned services,

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[42] See Ohio Edison Comments at 4-8; DelMarVa Power & Light Comments at 4-7, Public Service Company of New Mexico at 4-8; DLC Comments at 4-8; SBC Comments at 15.

[43] Time Warner Communications Holdings, Inc. Second Initial Comments at 13.

> including reasonable additional space required for safety, maintenance, and foreseeable demand. The Commission should clarify that the LEC constructing the pole, duct or conduit will have first right to use its own facilities to meet its projected customer demand. A contrary conclusion would create a disincentive to construct such facilities and jeopardize a carrier's ability to plan for the future needs of its customers.[44]

As BellSouth and others have noted, LECs have granted cable operators and other carriers access for years.[45] Therefore, the Commission should resist any attempt to compare third party attachees to a utility's affiliated or integrated operations.[46] The 1996 Act's asymmetrical mandatory access provision with its "just and reasonable" compensation standard (as opposed to the less restrictive "fair market value standard" generally applied in "just compensation" determinations), its exclusion of incumbent LECs from the benefits of rate protection or due process safeguards afforded all other LECs as pole attachees through the pole attachment complaint process, and its special provisions favoring cable systems and electric utilities are adequate safeguards. Incumbent LECs ought not be forced to operate its remaining assets inefficiently.

There is no reason to change the existing pole attachment complaint procedure's allocation of the burden of proof. Once a petitioner in a pole attachment complaint proceeding has met its initial burden of showing that a denial of access was not based on any of the reasons set forth in Section 224 (f)(2), or for lack of capacity, any respondent

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[44] Ameritech Comments at 36-37.

[45] In the legislative history to the original Pole Attachments Act, the Commerce Committee noted, "[i]t has been made clear in testimony by the CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem . . . Pub. L. 95-234 at 124. There is no discussion of Section new 224(f) in the legislative history of the 1996 Act.

[46] Ameritech Comments at 34; GTE Service Corporation Comments at 23-24; Pacific Telesis Group Comments at 19-20; NYNEX Comments at 12-13.

utility should be prepared to demonstrate the factual basis for a denial of access, whether for lack of capacity or for reasons of safety, reliability and engineering practices. Any utility that can demonstrate that a Section 224(f) denial for reasons of safety, reliability and engineering is based on non-compliance with the National Electric Safety Code, or a locally adopted version thereof,[47] could not, as a matter of law, be in violation of its duty under Section 251(b)(4). Respondent utilities denying access based on non-compliance with any other higher safety, reliability or engineering standard should demonstrate a good faith justification for the denial, but should not have to bear the burden of proof.[48]

Denial of access based on lack of capacity should recognize a utility's right to reserve a portion of the limited communications space on its own facilities for its own maintenance, service and future business needs. BellSouth supports those commenters who advocate a five year business projection as a basis for determining reasonably forseeable use. BellSouth agrees in with the Joint Commenters that conduit congestion may be relieved by pulling inner duct, provided that the LEC is always permitted to reserve sufficient spare capacity for maintenance and for copper plant.[49] Although issues such as pricing are properly addressed in the Commission's upcoming Section 224

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[47] Time Warner Comments at 14-15; See MFS Comments at 10 (LEC may deny access for specific reasons authorized in Section 224 (f)(2). The Commission should reject MFS's assertion of a right to audit.

[48] Infrasture Owners Comments at 40-42.

[49] Joint Comments at 16-17. BellSouth objects to the implication expressed in Joint Comments at 17, and AT&T Comments at 17, that Section 224 might require LECs to reengineer their networks at their own cost by upgrading from copper to fiber simply to make space available on poles and in conduits. BellSouth agrees with Cincinnati Bell that conduit solutions are not without limitations. Cincinnati Bell Comments at 9.

proceeding, new entrants requiring inner duct should pay for the costs of duct installation, but would pay rent according to the number of entities occupying the innerduct.[50]

BellSouth agrees with the Joint Commenters' interpretation of the interplay of Section 703(7)(i) and 703(7)(h) of the 1996 Act with two general observations. First, in all cases where a modification to a pole attachment is required to make space available to a new party, the new party should pay the capital costs of the modification, subject to Section 703(7)(h). Second, existing pole attachment agreements should be grandfathered, so that any previously bargained for allocation of these responsibilities is not impaired.[51]

Limitations, prohibitions, and restrictions on a utility's ability to alter or modify its pole plant should not be countenanced by the Commission, and especially not in this proceeding. The effect of such alterations or modification on rental rates, the amount of rent imputed to utilities the length and types of notices required under the Act, are all terms and conditions of Section 224 access that need not be resolved in this proceeding. Rather, the Commission should make all relevant portions of the Phase II record a part of

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[50] As Bell Atlantic notes, where a service provider's request for access would require replacement of an existing pole duct or conduit, that provider should bear the cost of replacing the facility and transferring the attachments of other providers. Bell Atlantic Comments at 15.

[51] See 1996 Act, Section 703 (7)(e), grandfathering license agreements between LECs and telecommunications carriers. The Commission should reject Sprint's suggestion that all users be charged the same rate for the next five years. Sprint comments at 17-18. Sections 224(d)(3) and 224(e) express a clear Congressional intention as to how rates structures are to be applied over the next five years. Similarly, ACSI's complaint that CATV providers pay less for pole attachments than other telecommunications providers is nevertheless consistent with the 1996 Act, which continues the differential rate treatment based on class of service. ACSI Comments at 6. However, contrary to ACSI's suggestion, the 1996 Act ensures that when a cable operator offers telecommunications service, it must pay the same rate as other telecommunications carriers. 1996 Act, § 224 (d)(3). Non-cable service providers, who are parties to license agreements as of the effective date of the 1996 Act, however, are subject to the rate reflected therein. Id.

the upcoming Section 224 record, or invite parties in that proceeding to resubmit their comments.[52]

CONCLUSION

The Commission need not promulgate any additional rules to implement those sections of the Telecommunications Act of 1996 that are the subject of this Phase II rulemaking. Section 251(c)(5) is essentially identical to the Commission's long-standing "all carrier rule." All the Commission need do is permit the offering of a new network interface immediately upon disclosure of the requisite information in order to facilitate rapid development of opportunities for interconnection. The requirements of Section 251 (d)(1) with respect to number administration and number portability have effectively been fulfilled in separate Commission proceedings commenced well in advance of the 1996 Act. All the Commission need do is to appoint, as quickly as possible, the constituent members of the North American Numbering Council and conclude its rulemaking in CC Docket No. 95-116.

The Commission should defer to the state's in the implementation of the Act's dialing parity requirements. The Commission should reject the efforts of new entrants to bootstrap rights of mandatory customer premises access on to the explicit provisions of the Pole Attachments Act. The commission should allow the terms and conditions of pole

[52] The NPRM for amended Section 224 is due to be issued any day now.

attachments to be negotiated between carriers and service providers, allow any disputes that may arise to be resolved through existing complaint procedures, and address any regulatory oversight issues in its separate Section 224 rulemaking.

Respectfully submitted,

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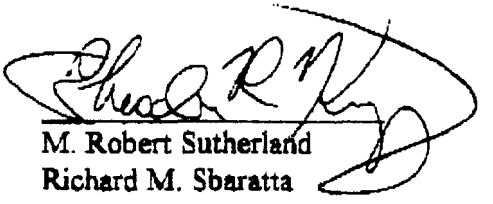
BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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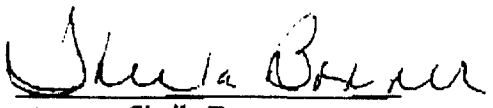
DATE: June 3, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of June, 1996 served all parties to this action with a copy of the foregoing REPLY COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



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